No. 83-1638

IN THE

Supreme Court of the United States

October Term, 1983

CHRISTOPHER EDDY, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA
and
HOOPA VALLEY TRIBE OF INDIANS,
Respondents.

HOOPA VALLEY TRIBE'S RESPONSE TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

Because respondent is dissatisfied with petitioners' statement of the first question presented, we restate it as follows:

1. The lower court chose to use the Hoopa Valley Tribe's membership standards, including Indian blood degree requirements, as the basis for determining which of some 4,000 individuals, ineligible for membership in the Tribe, nevertheless qualify as "members of the tribe or tribes concerned" within the meaning of 25 U.S.C. § 407. Did the use of these standards impermissably ignore the teaching of *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), because the court recognized as tribal members persons whom the Tribe would not enroll, and did the court's use of these membership standards violate the Equal Protection component of the Fifth Amendment because they include racial elements?[1]

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1. PARTIES TO THE PROCEEDINGS BELOW: Petitioners note that the names of all petitioners who are real parties in interest to the petition are not completely known but number at least 1,127. While the respondent Hoopa Valley Tribe shares some of the uncertainty about petitioners' identity, we would point out that a more accurate list showing 1,547 persons who appear to be represented by petitioners here, is found in the appendix of the Petition for Certiorari in *Hoopa Valley Tribe of Indians v. Jessie Short*, No. 83-1555, App. at 251-78.

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STATUTE INVOLVED

Section 407 of Title 25, United States Codes, provides:

> The timber on unallotted lands of any Indian reservation may be sold in accordance with the principles of sustained yield, or in order to convert the land to a more desirable use, under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales, after deductions for administrative expenses pursuant to section 413 of this title, shall be used for the benefit of the Indians who are members of the tribe or tribes concerned in such manner as he may direct.

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STATEMENT OF THE CASE[2]

A. The Reservation.

In 1973, the Court of Claims held in *Short v. United States* that the Hoopa Valley Reservation is a single reservation comprising two geographic parcels known as "the Square" and "the Addition." The Square contains valuable stands of unallotted timber, which are held in trust by the United States.

The Addition, in contrast, is largely held in fee by non-Indians. *See Blake v. Arnett*, 663 F.2d 906, 908 (9th Cir. 1981). Indeed, given its substantial non-Indian ownership and paucity of Indian residents, until 1973 there were substantial questions about the status of the lower part of the Addition as a reservation. *See Mattz v. Arnett*, 412 U.S. 481 (1973).

2. The Hoopa Valley Tribe here seeks to correct certain misstatements in the Statement of the Case in the Eddy Petition. For a fuller statement of the *Short* background, *see* Hoopa Valley Tribe's Petition in No. 83-1555.

B. Indians of the Reservation.

The Court of Claims also held that the proceeds from the sale of unallotted timber on the Square cannot be distributed exclusively to members of the Hoopa Valley Tribe. Rather, such distributions must include a second, amorphous group, which has come to be known as the "Indians of the Addition."

1. The Hoopa Valley Tribe.

The Hoopa Valley Tribe is the successor of aboriginal Indian tribes of the Trinity River vicinity, now residing on the Square. The Tribe and its successors have been recognized by the Federal Government for over 130 years. This recognition is binding upon the courts, *United States v. Holliday*, 70 U.S. 407, 419 (1866), and is in no way vitiated because the Tribe's aboriginal organization may not have possessed the formal attributes of contemporary governments. *E.g. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 664 (1979); *United States v. Washington*, 641 F.2d 1368, 1373 and n.6 (9th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982).

As early as 1851, a delegation appointed by the President at the direction of Congress (Act of September 30, 1850, 9 Stat. 544), was sent to negotiate a treaty with the "Hoo-pah" and other California tribes. A Hoopa chief represented his Tribe in the ensuing negotiations, which culminated in the signing of the treaty. (The treaty, however, was never ratified.) *See* Hoopa Valley Tribe's Response to Request for Review, App. at 19, (filed in *Short v. United States*, Ct. Cl. No. 102-63, Aug. 16, 1982).

By 1916, the Hoopa Tribe was holding semiformal council meetings. *Id.* In 1933, it adopted a written constitution, which was approved by the United States. App. D-203, *Short v. United States*, 202 Ct. Cl. 870, 954-56 (1973). In 1950, a new constitution containing membership provisions was adopted and approved. App. D-217, 223-24. The membership provisions were amended in 1963 and again in 1972. App. B-28-38.

Thus, membership in the Hoopa Valley Tribe is determined by the Tribe as an exercise of its inherent sovereign powers. This is the norm in Indian country: "A tribe's right to define its membership for tribal purposes has long been recognized as

central to its existence as an independent political community." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978).

2. "Indians of the Addition."

Determining who is an "Indian of the Addition" is an entirely different matter. Plaintiffs below, who claim to qualify as "Indians of the Addition," disclaim membership in *any* tribe. They have *no* form of tribal organization, and most of the plaintiffs do not reside on the Reservation, but live in non-Indian communities scattered throughout the United States.

Because the term "Indians of the Addition" does not refer to an organized entity, it is not surprising that there are no standards for determining who is an "Indian of the Addition." The Court of Appeals has undertaken to fill this void by judicially promulgating such standards.

The standards adopted by the court require that one of the ancestors of a plaintiff lived on the Addition, and some of the standards require ¼th Indian blood. A person who meets none of the standards may still be an "Indian of the Addition," if he can demonstrate that it would be manifestly unjust to hold otherwise.

C. The "Eddy" Petition.

Petitioners Eddy et al. are plaintiffs who do not meet the blood-quantum requirement and do not satisfy any alternative standard. Unless they can establish that their exclusion would be manifestly unjust, they will not qualify as "Indians of the Addition." In their Petition, they contend that the Indian blood-quantum requirement violates the Fifth Amendment.

The Hoopa Valley Tribe submits this brief in response to their Petition. The Tribe is the Petitioner in No. 83-1555, in which it seeks review, in part on somewhat related grounds, of the decision below.

I. SUMMARY OF ARGUMENT

The Tribe agrees with Petitioners Eddy et al. that the cause should be reviewed at this stage in the proceedings. Further,

it agrees that the equal protection guarantees implicit in the Fifth Amendment are applicable here. It disagrees, however, about the way in which those requirements apply.

The key statute at issue, 25 U.S.C. § 407, as well as the Fifth Amendment render untenable the theory that Reservation timber profits are to be distributed to individuals who are distinguished only by their race. Instead, they mandate that these Reservation resources go exclusively to Indian *tribes*, *i.e.*, political entities that provide the basis for constitutionally permissible classifications. *E.g.*, *Morton v. Mancari*, 417 U.S. 535, 553-54 (1974).

Remarkably, petitioners do not even cite the pivotal statute, 25 U.S.C. § 407, which requires that proceeds from the sale of unallotted timber be distributed for the benefit of the "members of the *tribe or tribes* concerned." In Section 407, Congress made plain its understanding that unallotted timber is held for the benefit of tribal members, not unaffiliated individuals who may happen to have an Indian ancestor who resided on a reservation. That reading alone avoids constitutionally suspect racial classifications.

Plaintiffs, by their own argument, are not members of an Indian tribe. Accordingly, as is argued in the Hoopa Valley Tribe's Petition for Certiorari in No. 83-1555, no statute mandates the payment of timber-sale proceeds to them, and there is no jurisdiction for their claims. The Court of Appeals arbitrarily rejected this argument, stating that plaintiffs were, after all, a "tribe" within the meaning of Section 407.

Substantial equal protection questions are raised by the Court of Appeals' holding that scattered individuals with no political, social or economic organization constitute an Indian tribe, *solely* because they can trace their ancestry to nineteenth century reservation residents and meet a blood-quantum requirement. Further, substantial jurisprudential concerns are raised by the court's endeavor to promulgate and apply tribal membership standards.

In contrast, no substantial question is raised by holding that membership in an Indian tribe — and the rights that flow from such membership — may be conditioned upon a tribally-imposed blood-quantum requirement.

II. ARGUMENT

A. The Cause Should be Heard at This Stage in the Proceedings.

The Tribe agrees with Petitioners that, in order "to prevent extraordinary inconvenience and embarrassment in the conduct of the cause," *American Construction Co. v. Jacksonville, Tampa and Key West Railway*, 148 U.S. 372, 384 (1893), the cause should be heard by this Court even though final judgment has not been rendered.

The Court of Appeals considers the fundamental determination in this case — the right of all Indians of the Addition to share per capita, as individuals, in distributed proceeds of 25 U.S.C. § 407 timber sales — to be final insofar as it is concerned. App. A-20. Further, the court has affirmed the standards adopted by the trial judge to determine who is an "Indian of the Addition" and has affirmed summary judgment for 2,303 plaintiffs, determining that they meet those standards.

The remaining proceedings — case-by-case determinations as to the qualifications of the remaining plaintiffs and the calculation of damages based on the total number of "Indians of the Reservation" — will be time consuming, impose substantial expenses on all parties, extend the period during which the bulk of the timber-sale proceeds benefit neither the plaintiffs nor the Tribe,[3] and add little to the final posture of the case. Thus, review is appropriate now. *See Gay v. Ruff*, 292 U.S. 25, 30 (1934); *Spiller v. Atchison, Topeka and Santa Fe Railroad Co.*, 253 U.S. 117, 121 (1920).

B. The Fifth Amendment Must Be Considered in Construing the Statute Authorizing Distribution of Timber Sale Proceeds.

The Tribe agrees with Petitioners Eddy et al. that the equal protection component of the Fifth Amendment is applicable here.

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3. Since 1974, 70% of all proceeds from the sale of unallotted timber on the Square have been sequestered in trust accounts by the Bureau of Indian Affairs.

But its importance relates to the interpretation of Section 407, the statute upon which the Court of Appeals hinged its analysis. Based on *Crowell v. Benson*, 285 U.S. 22, 62 (1932), and other authority, the Court of Appeals was bound to construe Section 407, if possible, in a manner that would not render it unconstitutional. Because federal Indian legislation is subject to scrutiny under the Fifth Amendment, *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 84 (1977), the equal protection requirements of that Amendment are plainly relevant to such statutory construction. *Id.*

The Court of Appeals concluded that the references to "Indian" and "tribe" in 25 U.S.C. § 407 include the qualifying Indians of the Addition, whether or not they belong to any tribe. But, shorn of any tribal affiliation or political organization, the term "Indian" refers only to an individual of a certain race. Racial classifications are "suspect" as petitioners argue, and to be consistent with the Fifth Amendment, the terms in § 407 must refer to the familiar non-racial classification comprising an Indian tribe, *i.e.*, " 'a separate people' with their own political institutions." *See United States v. Antelope*, 430 U.S. 641, 646 (1977); *Morton v. Mancari*, 417 U.S. 535, 553-54 (1974).

On its face, Section 407 unambiguously declares Congress' intent that the proceeds from the sale of unallotted timber be distributed to tribes and their members, and not to unaffiliated individuals. Congress plainly has the power to direct the distribution of proceeds from the sale of unallotted timber in this manner. *See Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976); *United States v. Jim*, 409 U.S. 80 (1972).

Congress' intent to restrict timber-sale proceeds to tribes and tribal members reflects fundamental congressional policies promoting tribal self-government:

> Underlying the federal [timber] regulatory program rests a policy of assuring that the profits derived from timber sales will inure to the benefit of *the Tribe*, subject only to administrative expenses incurred by the Federal Government. That objective is part of the general federal policy of encouraging tribes "to revitalize their self-government" and to assume control "over their business

> and economic affairs." *Mescalero Apache Tribe v. Jones*, [411 U.S. 145, 151 (1973)].

White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 149 (1980) (emphasis added).

The importance of Section 407 in this litigation can hardly be overstated. The Indians had no right to harvest timber commercially or retain timber proceeds before its enactment in 1910. *United States v. Mitchell*, 445 U.S. 535, 545 (1980). Thus, whatever rights the plaintiffs may have to timber-sale proceeds must be traced to Section 407,[4] which, as the Court of Appeals observed, is applicable to "all the monies claimed" in this lawsuit. App. A-6.

Accordingly, a constitutional reading of Section 407 compels the conclusion that only tribes or tribal members have rights to share in the proceeds of timber sales. If the term "tribe" lacked the familiar political connotation it would be constitutionally suspect. *See infra* at 9-10.

C. The Argument Made By Petitioners Eddy et al. Highlights the Substantial Jurisprudential Errors in the Court of Appeals' Opinion.

Relying on the faulty premise that the Reservation was set aside for individual Indians, not tribes, and ignoring Section

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4. Petitioners assume that in creating the reservation the Federal Government created compensable rights in individual "Indians," but this Court's rulings on property rights in Indian reservations created by Executive Order are fatal to this presupposition. *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 103 (1949).

Further, to the extent the 1864 statute authorizing this Reservation has a bearing on the claim in this case at all it must be read in light of this Court's holding in *Chippewa Indians v. United States*, 307 U.S. 1, 5 (1939):

> [W]e may not assume that Congress abandoned its guardianship of the tribe or the bands and entered into a formal trust agreement with the Indians [as individuals], in the absence of a clear expression of that intent.

Not only is there no expression of such an intent as to the Hoopa Valley Reservation, but the Court of Claims repeatedly said that the Reservation was created for tribes. *E.g.*, App. D-13-18, 202 Ct. Cl. at 878-79.

407 altogether, Petitioners Eddy et al. make the incredible suggestion that timber revenues be divided among the individuals present on the Reservation at its creation and all of their descendants on a *per capita* or *per stirpes* basis. "Eddy" Petition at 29. This is no less than a suggestion for judicial termination and distribution of the Reservation, an extreme intrusion of the judicial branch into a realm heretofore reserved exclusively to Congress. *See Solem v. Bartlett*, U.S. , 104 S. Ct. 1161 (1984); *Mattz v. Arnett*, 412 U.S. 481 (1973).

Petitioners' radical suggestion highlights, however, fundamental jurisprudential errors in the Court of Appeals' opinion. The clearest sign of this error is that the court has become enmeshed in the "delicate matter" of promulgating and applying tribal membership standards. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978). To our knowledge, no other United States court has ever undertaken this task.

In *Martinez*, this Court refused to infer a cause of action under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341, to review *tribally established* membership standards, in part because: (1) such actions would interfere with tribal autonomy and self-government, 436 U.S. at 59; and (2) the issues likely to arise in such actions "frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts," *id.* at 71.

Certainly these admonitions apply with greater force here, where the court is not reviewing tribally established standards, but promulgating standards in the first instance. Further, in undertaking this task for which it is peculiarly ill-equipped, the court has opened the doors to any individual Indian to circumvent *Martinez*: instead of suing a tribe or tribal official to obtain the benefits of tribal membership, the Court of Appeals invites that individual to sue the United States for excluding her from the distribution of tribal assets.

The Hoopa Valley Tribe agrees with Petitioners Eddy et al. to the extent that they argue that judicially promulgated tribal membership standards can be nothing but arbitrary. The establishment of such standards is properly reserved for either

the tribe itself, or the United States acting in its legislative or executive capacity. It is not a task for the judiciary. *See* F. Cohen, *Handbook of Federal Indian Law*, 20-21 (1982 ed.); *Montana v. United States*, 450 U.S. 544, 564 (1981); *Roff v. Burney*, 168 U.S. 218 (1897).

The Court of Appeals' unprecedented excursion into the promulgation of tribal membership standards is the result of its attempt to reconcile plaintiffs' lack of tribal affiliation with the mandates of 25 U.S.C. § 407 and the Fifth Amendment. Plaintiffs, including those for whom summary judgment of entitlement has been granted and affirmed, have consistently disclaimed membership in any tribe and, in fact, possess no political organization or any other political indicia of a tribe. Indeed, over 80% of the qualified plaintiffs have left, or never were on, the Reservation and live in communities scattered throughout the country. *See* Tribe's Request for Review, App. at 90 and exhibits 3-5, filed in *Short v. United States*, Ct. Cl. 102-63, June 25, 1982 (designated as part of the record in No. 83-1555). Their claim has been that, simply because they had an Indian ancestor who resided on the Reservation, they have inherited a right to share in Reservation resources.

The mandates imposed both by the Fifth Amendment and by 25 U.S.C. § 407, however, are plainly incompatible with such claims. More important, these constitutional and statutory provisions make it clear that there is no jurisdiction to entertain such claims, since no statute mandates payment of timber revenues to such persons. *See United States v. Mitchell (Mitchell II)*, U.S. , 103 S. Ct. 2961 (1983).

When confronted with these mandates for the first time, the Court of Appeals simply transformed these non-tribal individuals into tribal members. Its cursory analysis suffers from substantial constitutional and jurisprudential errors. *See* Hoopa Valley Tribe's Petition for Certiorari in No. 83-1555.

The court offered two reasons for its conclusion that the "Indians of the Addition" are, notwithstanding plaintiffs' disclaimers and the facts of the matter, a "tribe" within the meaning of Section 407. First, it reasoned circularly that if,

as had been held previously, "Indians of the Addition" are entitled to share in timber-sale proceeds, they must be a "tribe" withing the meaning of Section 407.

The issue, however, is whether non-tribal individuals can have a right to timber-sale proceeds consistent with the Fifth Amendment and Section 407. To say that it has already been determined that such individuals have a right to share in such proceeds, and therefore Section 407 must be construed to legitimize that result, begs the question.

Second, the Court of Appeals suggested that the term "tribe" has "no fixed, precise or definite meaning but can appropriately include Indians residing on one reservation." App. A-7. For this proposition it cited the definition of tribe in the Indian Reorganization Act, 25 U.S.C. § 479, and the pre-1964 version of Section 407, which directed the use of timber-sale proceeds for the benefit of "Indians of the reservation."

These arguments are fallacious. The IRA does define a tribe to include "Indians residing on one reservation." However, such "Indians" must be of one-half or more Indian blood, a requirement the court below did not apply to "Indians of the Addition." More important, the standards approved by the court did not require that "Indians of the Addition" reside on the Reservation, and, in fact, most do not reside there. Thus, the IRA offers no support for the court's sudden transformation of the "Indians of the Addition" into a tribe.

Similarly, the earlier version of Section 407, which provided that timber-sale proceeds be used for the benefit of "Indians of the reservation," does not support the court's holding that unaffiliated individuals with no continuing ties to the Reservation, whether by residence or otherwise, are proper beneficiaries. *See Halbert v. United States*, 283 U.S. 753, 762-63 (1931); App. 182 in No. 83-1555.

Thus, the Court of Appeals, with no authority beyond its own *ipse dixit*, has transformed a group of individuals, each distinguished only by his blood-quantum and some ancestral tie to the Hoopa Valley Reservation, into an Indian tribe. That transformation is fundamentally incompatible with the Fifth Amendment and with 25 U.S.C. § 407.

III. CONCLUSION

The Hoopa Valley Tribe agrees that *Short v. United States* presents substantial federal questions deserving immediate Supreme Court review. The Tribe also agrees that the Court of Appeal's analysis cannot be squared with the commands of the Fifth Amendment. The Tribe suggests, however, that the problem arises from ignoring the requisite political content of the term "tribe."

The Hoopa Valley Tribe therefore requests that the cause be heard, but not for the reasons petitioners suggest.

Respectfully Submitted,

/s/ _____
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May 21, 1984.